Nos. 91-1111 and 91-1128

In the

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATES IN NO. 91-1128

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QUESTION PRESENTED

Some of the defendants named in the respondent States' multi-count complaints, including petitioners, are reinsurers based in England. Some counts of the complaints allege that these English-based reinsurers conspired among themselves to restrain trade, in violation of Section 1 of the Sherman Act.

The question presented is:

Whether Section 1, consistent Supreme Court precedent interpreting it, and the Foreign Trade Antitrust Improvements Act require this Court to assert jurisdiction over these counts, when these reinsurers intended to affect markets in the United States and their conduct had direct, substantial, and foreseeable effects on those American markets, particularly when an assertion of jurisdiction would not conflict with international or foreign law?

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STATEMENT

In these cases, the nineteen respondent States[1] sued primary insurers, reinsurers, and others principally under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), for conspiracies in restraint of trade. The States allege that the interrelated conspiracies were designed to prevent American governments and businesses from obtaining the insurance products that they needed. Some of the defendants are reinsurers based in London, England (the "Reinsurers").[2] In some instances, the Reinsurers are alleged to have conspired with their American co-defendants; in others, they are charged with conspiring among themselves. The subject of the present case is the Reinsurers' contention that those latter instances are beyond the scrutiny of American antitrust laws. The court below found, and the States contend, that they are not.

A. FACTS

The complaints set forth all the relevant facts on which the parties and the courts below have relied. This section is drawn from the facts that those complaints allege.

The conduct at issue throughout these cases was directed at, and affected, the market for insurance risks within the United States. Those Reinsurers who are petitioners here (the "Reinsurer Petitioners") are members of

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[1] Each of the nineteen respondent States ("States") filed its own complaint. The California complaint ("Cal. Compt.") is representative of the "first wave" complaints filed in March 1988, *see* Joint Appendix ("JA")-5-56, and the Connecticut complaint ("Conn. Compt.") is representative of the "second wave" complaints filed in June 1988, *see* JA-57-102. The complaints are very similar. Citations will be made to the Connecticut complaint unless the context requires otherwise.

[2] Some reinsurance companies that are defendants are based in the United States. The claims against them are not before this Court in the instant case.

Lloyd's of London ("Lloyd's"), an insurance exchange based in London.[3] Conn. Compt. ¶ 4(h), JA-61-62. Other Reinsurers participate in the London Company Market, which includes reinsurers based in London who are not part of Lloyd's. *Id.* ¶ 4(i), JA-62. Lloyd's is closely tied to the United States. The United States market is by far the largest market for Lloyd's, and Lloyd's is the largest reinsurer of United States business. Proffered Facts ¶ V(D), JA-255.[4] The London Company Market consists of many entities owned by Americans, including many of the Reinsurers.[5]

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[3] Petitioners are Peter N. Miller ("Miller"), Robin A.G. Jackson ("Jackson"), Merrett Underwriting Agency Management Limited ("Merrett"), Three Quays Underwriting Management Limited ("Three Quays"), Janson Green Management Limited ("Janson Green"), Murray Laurence & Partners, D.P. Mann Underwriting Agency Limited, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited ("Sturge"). Miller was, during the period relevant to the complaints, the Chairman of the Council of Lloyd's of London. Conn. Compt. ¶ 27, JA-69. Jackson was an underwriter and agent for Merrett. Conn. Compt. ¶ 18, JA-67.

[4] On October 5, 1989, the States filed with the district court a motion and supporting memorandum seeking, *inter alia*, leave to amend their complaints. This pleading was accompanied by a synopsis of "Proffered Facts." The district court denied the States' motion. The court of appeals ruled that this denial was error. Appendix to Petition for Certiorari ("A")-26-27. Defendants have not asked this Court to review that ruling. The States therefore rely upon these Proffered Facts as though they had been alleged in the complaints.

[5] In addition to the nine Reinsurer Petitioners, *see* n.3, *supra*, seven other Reinsurers have joined Petitioners' brief. Merrett Br. 3 n.4. Of these, six are owned and controlled by United States corporations, including defendants Aetna and CIGNA and the parent corporation of defendant Hartford. Proffered Facts ¶ V(A)(1), JA-254. These six are CNA Re (U.K.) Ltd., Kemper Reinsurance London, Ltd., Excess Insurance Company,

The Reinsurers joined in a scheme, first set in motion by American primary insurer defendants, to limit insurance coverage to American primary insurers and insurance consumers. Part of the scheme involved conspiracies with those primary insurer defendants to withdraw certain types of coverage from the United States market. Petitioner Merrett Underwriting Agency Management Limited ("Merrett"), for example, is named as a defendant in almost every count of the complaints. *See, e.g.*, Conn. Compt. ¶ 19, JA-67. Representatives of Merrett conspired with the American defendants to eliminate or restrict primary insurance coverage. Toward this end, Merrett representatives met in the United States with their American co-conspirators to plan and implement those restrictions. The Merrett representatives also met in the United States with their American targets and threatened those American targets. *Id.* ¶¶ 82-89, JA-80-82. Reinsurers Three Quays Underwriting Management Limited ("Three Quays"), Janson Green Management Limited ("Janson Green"), Robin A.G. Jackson, and Peter N. Miller engaged in similar conduct. *Id.* Reinsurer Petitioners do not here challenge the assertion of jurisdiction over those claims.

When the scheme needed additional support, Merrett, Three Quays, Janson Green, and Messrs. Jackson and Miller joined with other Reinsurers in further conspiratorial acts to limit primary insurance coverage within the United States. These additional conspiratorial acts are

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Ltd., Terra Nova Insurance Company Limited, Unionamerica Insurance Company Ltd., and Continental Reinsurance Corporation (U.K.) Limited. The other joining defendant is Ballantyne, McKean & Sullivan Limited ("Ballantyne McKean"). Three other Reinsurers have neither petitioned this Court nor joined in the Reinsurer Petitioners' briefs.

the subject of the instant petition.[6] They involve reinsurance and retrocessional insurance.

Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Conn. Compt. ¶ 4(p), JA-63. Retrocessional insurance is a further layering of insurance; functionally it is another form of reinsurance. *Id.* ¶ 4(r), JA-63. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. *Id.* ¶ 4(p), JA-63. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. *Id.* Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers. *Id.* The critical relationship between reinsurance and primary insurance explains, in part, why the Reinsurers were enlisted by their American colleagues, and why American commerce was so profoundly affected by the conduct of the Reinsurers.

The claims at issue describe how the Reinsurers directly targeted *American* primary insurers and foresaw that their targeting would affect those *American* concerns. They further describe how the Reinsurers created profound effects *in the United States*. The Reinsurers withheld reinsurance, an essential input of *American* primary insurance, from *American* insurers in order to compel them not to offer coverage in *American* insurance markets.

The first of the claims at issue asserts that the conspirators engaged in a boycott to restrain the market for reinsurance coverage for *North American* risks. Conn. Compt. ¶¶ 125-129, JA-92-94. The boycott alleged in this

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[6] They are the Third, Fourth, and Fifth Claims of the Connecticut-style complaints and the analogous Fifth, Sixth, and Eighth Claims of the California-style complaints. Conn. Compt. ¶¶ 125-39, JA-92-97; Cal. Compt. ¶¶ 131-40, 146-50, JA-43-49.

claim, and all the others at issue here, did not involve worldwide reinsurance coverage, of which American risks were only a part. Rather, the boycotts were directed solely at North American or, more particularly, United States risks.

To accomplish the goal of restraining the market for coverage of North American risks, the Reinsurers employed two strategies. Both were designed to restrict the same coverage that their American co-defendants wanted to limit. First, the Reinsurers stated that they would not reinsure primary insurers who wrote on an "occurrence" basis. Second, they redesigned reinsurance treaties to eliminate coverage for "long tail" risks. *Id.* ¶ 91, JA-83.[7] The first strategy had a substantial effect in the United States, because the targeted primary insurers insured American risks. *Id.* ¶ 92, JA-83. Also, some of the Reinsurers "collectively refused to write new treaties for, or to renew long-standing treaties with, *primary U.S. insurers.*" *Id.* (emphasis added). As to the second strategy, the boycotters imposed the unlawful restrictions "within their treaties with *U.S. primary insurance companies.*" *Id.* ¶ 94, JA-84 (emphasis added). The States claim that, as a result of the Reinsurers' conduct, certain types of insurance coverage became unavailable, or were available only at an increased price, *in the United States. Id.* ¶ 129, JA-94.

The next claim at issue charges the Reinsurers with conspiring to restrain the market for casualty pollution coverage for *North American* risks. Conn. Compt. ¶¶ 130-134, JA-94-95. The complaints expressly allege

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[7] "Occurrence" coverage protects the insured against injuries or losses, whenever claimed, that occur during the policy period. Conn. Compt. ¶ 4(m), JA-62. It differs from "claims-made" coverage, under which the insurer is liable only for claims made during the policy period. *Id.* ¶ 4(a), JA-60. "Long tail risks" describe situations where claims may not be filed until many years after the occurrence that gives rise to the claims. *Id.* ¶ 4(v), JA-64.

that the Reinsurers agreed that North American casualty reinsurance treaties would include a total pollution exclusion. In order to consummate this agreement, representatives of Petitioner Sturge met with other leading Lloyd's underwriters and reinsurers. *Id.* ¶¶ 97-99, JA-84-85. As a result of the Reinsurers' agreement, pollution liability coverage became almost entirely unavailable, or available only at dramatically increased prices, *in the United States. Id.* ¶¶ 134, JA-95.

The final claim at issue charges the Reinsurers with conspiring to restrain the market for property insurance coverage for *North American* pollution, seepage, and contamination risks. Conn. Compt. ¶¶ 135-139, JA-95-97. That claim concerns the Non Marine London Market Agreement 1987 ("London Market Agreement"), which was signed by Lloyd's and London Company Market firms and *North American* companies. Conn. Compt. ¶¶ 111-13, JA-87-88. In this Agreement, the signatories solemnly promised to use "their best endeavours to ensure that *all U.S.A.* and Canadian *exposed insurance/reinsurance business* . . . will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable." *Id.* ¶ 112, JA-88 (quoting Agreement) (emphasis added). The effects of this Agreement were substantial; property insurance and reinsurance policies for *American* risks excluded seepage, pollution and contamination coverage, or provided such coverage only at increased prices. *Id.* ¶¶ 114, 139, JA-88, 97.

This conduct was not part of the usual practice at Lloyd's or in the London Company Market. Both markets operate on a principle of free competition that does not condone boycotts. Proffered Facts ¶ V(F), JA-255-56. Further, advance agreements prohibiting participants from writing certain types of coverage are inconsistent with the custom and practice in both markets. *Id.*

B. PROCEEDINGS AND DECISIONS BELOW.

In March 1988, eight states filed complaints charging the conduct described above. JA-3. Eleven other states later filed substantially similar complaints. *Id.* The district court ordered, as part of its pre-trial case management, that no motion be filed that would turn on disputable issues of evidentiary fact, and that no discovery would be permitted into disputable issues of fact. JA-103-05, 108. As a result, no discovery was conducted, and this case comes to this Court on a completely undeveloped factual record.[8] The Reinsurers filed motions to dismiss. They argued that the claims at issue were barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a (1988), as well as by considerations of international comity.

Relying exclusively on the allegations of the complaints, the district court held that the claims at issue stated a cause of action under Section 1 of the Sherman Act. A-70-71. It further held that those claims satisfy the requirements of the FTAIA, in that they allege that the Reinsurers' conduct produced direct, substantial, and foreseeable effects in the United States. *Id.*

Although the district court suggested that this finding might dispose of all the matters at issue in the instant petition, it felt obliged to apply the "jurisdictional rule of reason" required by the Ninth Circuit's *Timberlane* cases.[9] A-70 n.28. This test obliges a court that is considering whether to assert jurisdiction to engage in a three step process, and in the third step to balance seven factors in

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[8] The pre-filing investigation conducted by a few of the States was not the same as, nor a substitute for, discovery conducted under the Federal Rules of Civil Procedure.

[9] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) ("*Timberlane I*"), *after remand*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985).

order to accommodate considerations of comity.[10] A-70-72. In applying the *Timberlane* test the district court found that it was foreseeable that Petitioners' conduct would affect the United States and that the effects of that conduct occurred predominantly in the United States. A-76-77. It nevertheless found that asserting jurisdiction over these claims would conflict with English law and policy, and treated that conflict as dispositive unless outweighed by other factors. A-75. It therefore dismissed the claims at issue. A-77-78.

The States filed a timely motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure asking the district court to reconsider its holding. In that motion, the States also sought leave to amend their complaints to cure any pleading defects that the district court might have found. A-78. The district court denied that motion. *Id.*

The States appealed to the Ninth Circuit Court of Appeals. A panel of that Court, consisting of Judges Noonan, Beezer, and Singleton, agreed that the complaints set out violations of Section 1 of the Sherman Act and satisfied the requirements of the FTAIA. A-27-28. On the international comity issue, it reversed the district court's dismissal and ordered the States' complaints reinstated. A-27-31. Although it agreed with the district court that the claims at issue conflicted with foreign law, the court of appeals held that all of the other *Timberlane* factors favored assertion of jurisdiction and so outweighed the conflict factor. *Id.*. Most notably, it held that substantially all of the effects of the Reinsurers' conduct took place in the United States. A-30. "[T]he actions of the foreign defendants has had the kind of 'real economic consequences' for the American economy that strongly weigh in favor of the exercise of jurisdiction." *Id.* (citations omitted). The court of appeals also stated that the FTAIA should inform comity analysis; it would only be in

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[10] The seven *Timberlane* factors are set forth at p. 39 n.40, *infra*.

an unusual case that a court would decline jurisdiction when conduct produced direct, substantial, and reasonably foreseeable effects in the United States. A-28.

The Reinsurers filed a petition for rehearing and a request for rehearing *en banc* with the court of appeals. Their petition and request was denied. No judge of the circuit voted for rehearing. A-84-92.

C. PROCEEDINGS IN THIS COURT.

Petition No. 91-1128 sought review of the international comity holdings of the court of appeals. On October 5, 1992, this Court granted a writ of certiorari in No. 91-1128. JA-308. Petitioner Merrett filed a brief ("Merrett Br.") on behalf of itself and seven other Petitioners ("Merrett Petitioners"). Petitioner Sturge filed its own brief ("Sturge Br."). The United Kingdom and Canada have filed *amicus* briefs ("U.K. Br."; "Canada Br.") on behalf of Reinsurer Petitioners.

SUMMARY OF ARGUMENT

The Sherman Act applies to conduct that is intended to affect the United States and that does materially affect this country, regardless of where that conduct occurred. That has been the consistent teaching of this Court's precedents for half a century, yet the Reinsurer Petitioners never even mention these Supreme Court cases. *Stare decisis* requires this Court to adhere to these precedents, particularly in the area of statutory construction. The Reinsurers expressly intended to affect the American insurance market. Their conduct had substantially all its effects in the United States. Because the Supreme Court's test is thus clearly met here, this Court must, on the record before it, assert jurisdiction over the allegations in the complaints. In so doing, it must affirm the decision of the court of appeals.

A recent Congressional enactment also compels this Court to assert jurisdiction here. The Foreign Trade

Antitrust Improvements Act applies the Sherman Act to foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. The plain meaning of the statute compels this application. In this case, both courts below held that the Reinsurers' conduct had the requisite effect. The Reinsurer Petitioners have not challenged those holdings in this Court.

The need to assert subject matter jurisdiction is all the more striking in light of the complete absence of conflict between American law on the one hand, and international and English law on the other. Like American law, international law recognizes that the presence of effects within the territory of a country can justify that country in exercising subject matter jurisdiction. Further, the exercise of jurisdiction here would not result in any conflict with English law and policy. That law either prohibits, or at most merely permits, the sort of conduct at issue here. This does not create a conflict. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962). This Court has described only two circumstances in which it might abstain from Sherman Act jurisdiction in cases involving foreign conduct. One is where a foreign sovereign compelled the conduct, and the other is where that sovereign undertook the conduct. Neither is even arguably at issue here.

The Reinsurer Petitioners ignore decades of Supreme Court precedent, clear statutory language, and long-established doctrines. Instead, they propose that this Court adopt a new abstention doctrine in the form of a multi-factor balancing test. In another case that the Reinsurer Petitioners do not even cite, this Court unanimously refused to apply a new "vague doctrine of abstention" to an antitrust claim involving foreign conduct: "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406, 409 (1990).

A vague multi-factor test would not provide a useful addition to this Court's precedents. If that test is interpreted to give primacy to an intent to harm American commerce and the presence of material effects in the United States, it would yield the same result as this Court's case law. Only by elevating the Reinsurer Petitioners' unsupported assertions of a conflict with foreign law over other factors would the analysis produce a different result. Thus, as the court below held, the complaints satisfy the requirements of a *Timberlane*-style multi-factor test, properly applied. Any other interpretation of this multi-factor test, certainly any that would deny jurisdiction in this case, would directly conflict with the Sherman Act and this Court's precedents.

ARGUMENT

I. THIS COURT SHOULD FOLLOW THE SHERMAN ACT, AND HALF A CENTURY OF CONSISTENT PRECEDENT INTERPRETING IT, BY DECIDING THAT AMERICAN COURTS SHOULD ADJUDICATE ANTITRUST CLAIMS WHERE THE CONDUCT IS INTENDED TO AFFECT THE UNITED STATES AND WHERE IT HAS A MATERIAL EFFECT IN THIS COUNTRY.

The States allege that the Reinsurers intended to affect American commerce and succeeded in doing so by collectively withdrawing necessary components of the American insurance package. Under settled principles decided by this Court over almost fifty years, the Sherman Act confers jurisdiction over these allegations.

A. The Intent and Material Effects Test Has Been Followed by This Court for Almost Half a Century.

"[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Section 1 of the Sherman Act prohibits "[e]very . . . conspiracy, in restraint of trade . . . with foreign nations."[11] For almost half a century, this Court has construed that language to cover foreign conduct that is intended to have, and has, material effects in this country. Although they scarcely mention these precedents, Reinsurer Petitioners ask this Court to overrule them and set a new standard for jurisdiction.

The seminal decision, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*") (L. Hand, J.), although formally a Second Circuit case, "was decided . . . under unique circumstances which add to its weight as precedent." *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).[12] The circuit court panel, acting as the delegatee of this Court, held that a conspiracy consisting solely of conduct by foreigners that took place entirely outside the United States could be subject to liability under Section 1 of the Sherman Act if the parties intended to, and did, materially affect United States commerce. *Alcoa*, 148 F.2d at 439-45. *Alcoa*'s holding is consistent with, and builds upon, earlier Supreme Court precedent.[13]

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[11] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988).

[12] This Court could not obtain a quorum of six justices to hear *Alcoa*. Pursuant to the law then codified at 15 U.S.C. § 29 (now in substantially the same form at 28 U.S.C. § 2109 (1988)), this Court referred that case to a panel of circuit court judges. 148 F.2d at 421. The panel consisted of Learned Hand, Augustus Hand, and Thomas Swan.

[13] *See United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (conduct in part in Mexico by Mexicans could support a Sherman Act claim); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (combi-

In assessing the applicability of the Sherman Act to foreign conduct by a foreign entity, the *Alcoa* court acknowledged that the Sherman Act should be construed to follow the "limitations customarily observed by nations upon the exercise of their powers," namely "those fixed by the 'Conflict of Laws.' " *Id.* at 443. In applying those limitations, the court noted two countervailing principles. While Congress presumably did not intend "to punish all whom its courts can catch, for conduct which has no consequences within the United States," it is also "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.*

The court set out a two-part test that took account both of the obligation to foreign nations and of the need to protect Americans. First, the plaintiff had to show that the conduct was intended to affect American commerce. *Id.* at 444. Once intent was shown, the burden of proof shifted to the defendant to show that the challenged conduct did not "materially affect" that commerce.[14] *Id.*

This Court has consistently endorsed the principles established in *Alcoa*, and indeed has applied them in contexts ranging beyond the antitrust laws. Seven years

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nation that was formed in a foreign country but that "affected the foreign commerce of this country and was put into operation here" subject to the Sherman Act); *United States v. Pacific & Arctic Ry. and Navig. Co.*, 228 U.S. 87 (1913) (Canadian participants in a conspiracy to control shipping between Canada and the United States subject to American antitrust laws); *Strassheim v. Daily*, 221 U.S. 280 (1911) (domestic effects sufficient to support subject matter jurisdiction).

[14] The court overturned a finding of the district court that the conduct did not materially affect such commerce. "Thus, it may be concluded that the court's requirement for jurisdiction included a material or substantial effect." 1 W. Fugate, *Foreign Commerce & the Antitrust Laws* § 2.11, at 69 (4th ed. 1991).

after that decision, the Court relied on *Alcoa* to hold that there is no "blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country . . . are often decisive." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (Lanham Act case). In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court again followed *Alcoa* in finding a Canadian conspirator liable for Sherman Act violations for its actions in Canada. Justice White wrote for a unanimous Court, "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Id.* at 704-05. *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 113 n.8 (1969) (White, J.); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951).

By 1971, when the Court decided *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971), it cited *Alcoa* as stating the "modern principles of the scope of subject matter . . . jurisdiction." Ohio had charged a Canadian concern with dumping pollutants into the Canadian portion of Lake Erie, thereby harming Ohio citizens. The Court noted that if the charges of "acts, albeit beyond Ohio's territorial boundaries, that have produced . . . disastrous effects within Ohio's own domain" proved to be true, Ohio's courts would have "competence to act." *Id.*[15]

Over the past decade, this Court has reaffirmed the holding of *Alcoa*. In *Matsushita Electric Industrial Co. v.*

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[15] As in *Alcoa*, the *Wyandotte* Court found subject matter jurisdiction for conduct that took place entirely outside the United States (polluting Lake Erie from Canada) and engaged in entirely by a foreign national (a Canadian subsidiary of an American company).

Zenith Radio Corp., 475 U.S. 574, 582 (1986), the Court cited *Alcoa* for the proposition that the Sherman Act does not apply to conduct having purely foreign *effects*. It then gave the corollary: "The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce." *Id.* at 582 n.6. By 1990 a unanimous Court could state that any suggestion "that the antitrust laws had no extraterritorial application" has now been "substantially overruled." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 407 (1990).

This Court has thus consistently construed the Sherman Act in a way that takes account of foreign and domestic interests. It has endorsed a jurisdictional requirement of intent and material effects in the United States. Nowhere in Reinsurer Petitioners' 72 pages of briefs do they cite even one of the Supreme Court cases discussed in this section. Instead, the Supreme Court jurisprudence on which the Merrett Petitioners principally rely consists of "three cases involving foreign seamen." Merrett Br. 10.[16]

Stare decisis compels this Court to adhere to its *applicable* case law, as described in this section, rather than to

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[16] In those cases, the Court "deferred to a non-national or international maritime law of impressive maturity and universality." *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953). Maritime law is *sui generis*. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 1-1 (2d ed. 1975). No comparable body of "non-national or international" law would apply, much less create a conflict, in this case. *See* pp. 26-38, *infra*.

Merrett Petitioners also rely, to no avail, on *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) ("*Aramco*"). Merrett Br. 13. Among the reasons that *Aramco* is not on point is that the Court was there construing the application of Title VII to foreign conduct *for the first time*. Here, it is construing the Sherman Act *after a long line of its own cases* has held, as Petitioners' *amicus* Canada concedes, Canada Br. 14, that the Act does apply to foreign conduct.

rely on unrelated maritime cases. " '[A]ny departure from the doctrine of stare decisis demands special justification.' " *Patterson*, 491 U.S. at 172 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). While a change in circumstances can sometimes provide such a justification, *see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), the circumstances today lead, if anywhere, even more in the direction of an *Alcoa* intent and material effects test. Protecting American consumers was "Congress' foremost concern in passing the antitrust laws." *Pfizer Inc. v. India*, 434 U.S. 308, 314 (1978). To protect those consumers, the United States must be able, in the colorful concession of Petitioner Sturge's Brief, to "defend itself against economic aggressors of another nation who may wish to sharp shoot across national borders and can do so with impunity." Sturge Br. 19-20. Such protection, Petitioner Sturge further concedes, is especially necessary "in a global interdependent economy." *Id.* at 20. An intent and material effects test provides this protection.

B. The States Have Alleged That the Reinsurers Intended to, and Did, Materially Affect American Commerce.

The States have alleged conduct by the Reinsurers that satisfies the standard of intent and material effects. The so-called "London reinsurance claims" allege an Anglo-American scheme to limit American primary insurance coverage, for which the withdrawal of American and English reinsurance support was a means.[17]

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[17] Petitioners frequently refer to the "London reinsurance markets," *e.g.*, Merrett Br. 3, as though those were the subject of the case. The complaints focus not on those markets, but on *the market for insurance risks within the United States*. All of the purchasers in that market are in the United States. Moreover, the "London reinsurance markets" are intimately tied to this

Reinsurer Petitioners suggest that the English conspiracies that formed part of this scheme "are only tangentially related to the core complaint here, namely, the availability of CGL insurance in the United States." Sturge Br. 10-11. This suggestion does not mesh with the suggestion made by the Hartford Petitioners in the connected case, that "[p]rimary insurers and reinsurers are uniquely intertwined and interdependent." Hart. Br. 2. The suggestion also contradicts the teaching of this Court in *Continental Ore* that treating the five counts of the plaintiff's complaint "as if they were five completely separate and unrelated lawsuits . . . was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 698-99. The counts in the complaints here should also be seen as part of a whole.[18]

1. Reinsurers Intended, and Foresaw, that their Conduct Would Affect American Commerce.

Viewed as a whole, or even in Reinsurance Petitioners' disjointed fashion, the complaints easily satisfy this Court's intent and material effects test. For example,

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country. "A very large share of the Lloyd's business – more than half overall and as much as two-thirds in certain specialist markets – is sold to the United States." G. Hodgson, *Lloyd's of London: A Reputation at Risk* 9-10 (1984).

[18] The Connecticut-style complaints charge all the defendants, both domestic and foreign, with an overarching conspiracy. Conn. Compt., First Claim for Relief, JA-88-90. Contrary to the contention made by the Reinsurer Petitioners, Merrett Br. 24 n.20, the court below did not affirm the dismissal of that claim. Rather it reversed and remanded with leave for the States to amend in the manner that the States had suggested. A-26-27. Even without this claim, the court below properly treated the conduct here as interconnected. A-16, 21-22.

in the London Market Agreement, the Reinsurers aimed their refusal to provide property pollution reinsurance directly at " *'all U.S.A. . . . exposed insurance/reinsurance business.'* " Conn. Compt. ¶ 112, JA-88 (quoting Agreement) (emphasis added). The intent to affect American commerce in this case is at least as strong as the intent that satisfied the court in *Alcoa*. There, the parties to the agreement extended their production and sales quotas to include imports into the United States. 148 F.2d at 442-43. This "change," the court wrote, "was deliberate and was expressly made to accomplish" an effect on imports. *Id.* at 444. The same could be said of the Reinsurers' conduct. The States allege no intent to affect British commerce.[19]

The district court did not dispute these facts. Instead, it held that the Reinsurers did not intend to harm American commerce because their actions had a "legitimate business purpose." A-77. As the court of appeals noted, the district court had asked the wrong question. The issue was not whether the Reinsurers' conduct was justified; this goes to the merits. *See also* Brief for the United States as *Amicus Curiae* to the Ninth Circuit, at 30 (May, 1990). Rather, the correct question is "was [the conduct] intended to have effects here? The answer in this case must be yes." A-31.[20]

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[19] The Merrett Petitioners base their advocacy of a balancing test in large measure on "two generations of Restatements." Merrett Br. 7. Yet the most recent generation would not allow balancing in this case. It recognizes that, in antitrust cases, a principal intent to interfere with American commerce, combined with even minimal effects on that commerce, obviates the need for any balancing test. *Restatement (Third) of the Foreign Relations Law of the United States* § 415 comment a (1987). Both conditions are more than satisfied here.

[20] Moreover, Petitioners' purpose was not legitimate. In a legitimate cooperative enterprise, the enterprise *adds* a product or service of value to the market. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (*"BMI"*). While a

Not only was a material effect on American commerce intended, it was also reasonably foreseeable. The Reinsurers "concede[d]" in the district court that the foreseeability factor weighed against them. A-77. The court of appeals held that, "[a]s intended, the effects were, of course, foreseeable." A-31. This holding is clearly correct. Because the Reinsurers aimed their boycott agreements straight at the heart of the "United States . . . exposed insurance/reinsurance business," they must have foreseen that they might hit their target.

2. Reinsurers' Conduct Had Material Effects in the United States.

The district court's determination that the complaints satisfy the "direct, substantial, and reasonably foreseeable effect" test of the FTAIA, A-69-70, affirmed on appeal, A-27, is dispositive on the issue of substantiality of effects, as it was for the circuit court, A-30. In any event, both courts below held that the effects in the United States of the Reinsurers' conduct outweighed the effects anywhere else in the world. The circuit court wrote, "Accepting as true the plaintiffs' allegations, the actions of the foreign defendants has had the kind of 'real economic consequences' for the American economy that strongly weigh in favor of the exercise of jurisdiction." A-30. The district court held that "the conduct of [the foreign] defendants had a sufficiently significant effect in

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reinsurance treaty might add a service of value, the complaints, contrary to Petitioner Sturge's contentions, Sturge Br. 38, do not challenge those treaties. Rather, the complaints allege agreements to *withdraw* services from the market. Further, in *BMI*, the participants "retain[ed] the rights *individually* to license public performances" of their work. 441 U.S. at 11 (emphasis added). By contrast, the participants in the instant agreement were prohibited from offering the forbidden coverage individually. *See* Conn. Compt. ¶ 99, JA-85.

the United States to make this factor weigh in favor of the exercise of jurisdiction." A-76.

American effects were indeed overwhelming. Earlier this year, this Court unanimously held that the activities of "foreign corporations with no other connections to the United States" could have a "direct effect" in this country. *Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2168-69 (1992) (construing Foreign Sovereign Immunities Act). Here, the Reinsurers had many connections with the United States, including Lloyds' writing half of its casualty business on American risks. Proffered Facts ¶ V(D)(3), JA-255. The direct effects of their activities took place here. Reinsurance is an essential input into American primary insurance. Conn. Compt. ¶ 4(p), JA-63. By denying that input, the Reinsurers made occurrence, casualty pollution, and property pollution coverage unavailable in this country, or available only at exorbitant costs. Conn. Compt. ¶¶ 129, 134, 139, JA-94-96.

The court of appeals rightly corrected the district court for not according sufficient weight to its finding that the effects were predominantly American. *Accord*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 237' (1992 Supp.) (approving decision of the court of appeals in the instant case because the "only intended effect [of the agreements at issue] would be felt in the United States"). When those effects are coupled with intent, this Court's precedents treat them as dispositive.[21] Even under the interest balancing formulas, such as the approach espoused in the Ninth Circuit's *Timberlane* cases, material effects are dispositive, in practice if not in theory. "A pragmatic assessment of those decisions adopting an interest balancing approach indicates *none where United States jurisdiction was declined* when there was more than a *de minimis* United States interest." *Laker Airways Ltd. v.*

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[21] When they are coupled with foreseeability, *see* p. 20, *supra*, the FTAIA treats them as dispositive. *See* pp. 22-26, *infra*.

Sabena, Belgian World Airlines, 731 F.2d 909, 950-51 (D.C. Cir. 1984) (emphasis in original). *See also* Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 Int'l L. & Pol. 565, 574 (1987). The States have found, and Reinsurer Petitioners have cited, no cases to the contrary.

It is instructive, in this regard, to compare the effects here with those in *Timberlane*. There, the plaintiff wanted to establish itself as a lumber dealer in the Honduran lumber market. *Timberlane II*, 749 F.2d at 1380. A lien foreclosure by defendants prevented this. *Id.* The plaintiff alleged that if it had been able to establish this business, it would have exported lumber to the United States. *Timberlane I*, 549 F.2d at 601. The court held that, during the relevant years, Honduran lumber never constituted more than 11/100 of one percent of total United States lumber consumption. "Clearly," held the court, "Honduran imports have only a miniscule [*sic*] effect on United States lumber markets." *Timberlane II*, 749 F.2d at 1385.

It is impossible to deem the American effects pleaded in the instant case minuscule. The buyers of the reinsurance, the boycott victims (the nonconspiring primaries), and all the consumers are American. The product, reinsurance of *domestic American risks*, is peculiarly American. Also, while the Honduran lumber industry had no significant impact on the American market, Lloyd's is the largest reinsurer of American risks. Proffered Facts ¶ V(D)(4), JA-255. This is an American case, and *stare decisis* requires an American court to assert jurisdiction.

II. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT REQUIRES AMERICAN COURTS TO EXERCISE JURISDICTION OVER CASES IN WHICH THERE IS A DIRECT, SUBSTANTIAL, AND REASONABLY FORESEEABLE EFFECT ON AMERICAN COMMERCE.

A recent Congressional enactment also compels this Court to assert jurisdiction here. Passed in 1982, the

FTAIA provides that the Sherman Act does not apply to conduct involving commerce with foreign nations, other than import commerce, "unless such conduct has a *direct, substantial, and reasonably foreseeable effect* on trade or commerce which is not trade or commerce with foreign nations" (emphasis added).[22] The Sherman Act therefore does apply to conduct that has a direct, substantial, and reasonably foreseeable effect on non-foreign (i.e., domestic or import) commerce. Both courts below held that the States had alleged the requisite effects, A-69-70, A-27, and the States have demonstrated to this Court that they have alleged these effects. *See* pp. 20-22, *supra*.[23]

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[22] The FTAIA, 15 U.S.C. § 6a (1988), reads:

"Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title shall apply to such conduct only because of the operation of paragraph 1(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States."

[23] While Reinsurer Petitioners seem to suggest that their conduct is foreign commerce, Merrett Br. 4, in which case the FTAIA would apply by its terms, their *amicus* Canada characterizes their refusing to sell into the United States as "import commerce." Canada Br. 14 n.12. The terms of the FTAIA exclude import commerce, which is thus subject to the *Alcoa* intent and material effects test. Because that test does not differ significantly from the direct, substantial, and reasonably foreseeable effects test of the FTAIA, lead-

Earlier this year, this Court noted, "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).[24] Attempting to circumvent this rule, Reinsurer Petitioners rely on a single sentence in the House Report that cites *Timberlane I* and purports to allow courts to employ comity analyses to circumscribe their own jurisdictions. Merrett Br. 21; Sturge Br. 30. Justice Scalia has rightly criticized treating a reference to a small number of lower court cases "in a document issued by a single committee of a single house as the action *of Congress*." *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original). This Court should give that sentence as little attention as members of Congress probably did. *See id.* ("Members have better uses for their

ing commentators have argued that the FTAIA has codified the same standard for imports and exports. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236'a (1992 Supp.). In any event, it would be difficult to defend a construction of the statute that allowed *greater* immunity for imports aimed directly into the United States than for foreign conduct that would less directly affect this country.

[24] The same strictures apply to Reinsurer Petitioners' argument that "Congress could not have intended" the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1988), to permit domestic insurers to engage in certain conduct while prohibiting foreign reinsurers from engaging in the same conduct. Merrett Br. 29-30. "The question, however, is not what Congress 'would have wanted' but what Congress enacted." *Argentina v. Weltover, Inc.*, 112 S. Ct. at 2168. Congress enacted a partial exemption from the Sherman Act for the business of insurance to the extent that it is "regulated by State law." 15 U.S.C. § 1012(b). Congress could thus certainly have intended to exempt certain insurer conduct *that the states regulate* for the benefit of American consumers and businesses, while not exempting reinsurer conduct *that the states do not regulate*.

time than poring over [lower] Court opinions."). Instead, it should follow the teachings of *Aramco*, on which Reinsurer Petitioners purport to rely, Merrett Br. 13, and glean "congressional purpose" from "language in the relevant act."[25] 111 S. Ct. at 1230 (citations omitted).

Even if the House Report were probative, it would not require a comity balancing analysis. After the sentence citing *Timberlane* on which Reinsurer Petitioners rely, the Report continues, "Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist." H.R. Rep. No. 686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 2487, 2498.

In the recent, unanimous opinion in *Kirkpatrick*, an antitrust case, 493 U.S. at 402, this Court refused an invitation to use "principles of abstention" to "expand[] judicial incapacities" beyond those already set forth *by the courts* in the act of state doctrine. *Id.* at 409. *A fortiori*, it should not expand judicial incapacities beyond those set forth *by Congress* in the FTAIA. This Court should treat that statute as dispositive here and accept the unappealed holdings of both courts below that the complaints satisfy its terms.

Even if this Court does not find the FTAIA to be dispositive, at the least the court of appeals was clearly correct when it stated that "[i]f a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a 'direct, substantial, and reasonably foreseeable effect' on American commerce, it is only *in an unusual case* that

[25] The district court in this case and leading commentators have also suggested that the plain meaning of the FTAIA, foreclosing any additional judicial interest balancing, overcomes the sentence in the House Report. *See* A-70 n.28; P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236'a (1992 Supp.); 1 W. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.15, at 105 (4th ed. 1991).

comity will require abstention from the exercise of jurisdiction." A-28 (emphasis added). It is remarkable that Reinsurer Petitioners and their *amici* ridicule this position, in light not only of the plain meaning of the FTAIA, but also of fifty years of Supreme Court case law concerning the need to assert antitrust jurisdiction and *Kirkpatrick*'s statement that abstention should occur only rarely (or "in an unusual case"). *E.g.*, Merrett Br. 19-20, U.K. Br. 23.

Even Professor Kingman Brewster, who "pioneer[ed]" the *Timberlane* balancing test, Merrett Br. 16, wrote that "the significance of the challenged conduct for American commerce should be of *central importance* in assessing the propriety of an exercise of jurisdiction under the balancing standard." 1 J.R. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 6.14, at 167 (2d ed. 1981) (emphasis added). The decision of the court of appeals thus does nothing more than apply the established presumption that the presence of powerful American effects militates strongly against abstention.

III. THIS CASE PRESENTS NO CONFLICT WITH INTERNATIONAL OR FOREIGN LAW.

Disregarding both consistent Supreme Court precedent dating from *Alcoa* and the legislative directives of the FTAIA, the Merrett Brief calls for the creation of a new abstention doctrine. It demands that this Court defer to "principles of international law and comity," in order to avoid "significant conflict with the law and policy of the United Kingdom." Merrett Br. 12, 27.

In so urging this Court, the Merrett brief totally ignores *Kirkpatrick*. Defendants there asked the Court to use "international law" and "international comity" to justify abstention, just as Reinsurer Petitioners do. 493 U.S. at 404-05. This Court firmly rejected this request. It denied that those "policies are a doctrine unto themselves, justifying expansion of . . . unspecified ' . . . principles of abstention' . . . into new and uncharted fields."

Id. at 409. The Court should also reject Reinsurer Petitioners' efforts to expand abstention into a new and uncharted field. As this Court stated, "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.*

Those efforts are especially unwarranted here. In the first place, international law supports, rather than contradicts, the use of the intent and material effects test. Second, American antitrust law does not conflict with applicable English law.

A. No Principles Drawn from International Law or Comity Are Inconsistent with this Court's Half Century of Precedent.

International law endorses an intent and material effects test. "[T]he usage of the civilized world" holds that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911) (Holmes, J.).[26] Thus, as counsel for Petitioner Sturge has written, "most western nations . . . include . . . effects within the territory" as one of the "accepted bases for the exercise of jurisdiction." Fox, *Extraterritoriality*, 19 Int'l L. & Pol. at 583. *Accord*, *Laker*, 731 F.2d 909 at 923.[27]

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[26] Although the case concerned states of the Union, its language shows that it applies internationally.

[27] Those countries include Germany and Austria. Germany: An Act Against Restraints of Competition, § 98(2) ("This Act shall apply to all restraints of competition occurring in the territory of application of this Act, *even if they result from acts done outside such territory.*"; emphasis added), *reprinted in* A-2 D.J. Gijlstra, gen. ed., *Guide to Legislation on Restrictive Business*

The governments of Canada and the United Kingdom appear before this Court as *amici* and contend that an exercise of jurisdiction here would be unwarranted. Yet the Canadian government has advocated just such an exercise. Its Restrictive Trade Practices Commission has argued "that where any overt act which takes place in Canada flows from an agreement which is contrary to the public policy, public interest or public order of Canada, such agreement comes within Canadian jurisdiction even if it was not made in Canada . . . [and] even if the agreement does not violate the law of the country where it was made." Canada, Restrictive Trade Practices Comm'n, *Shipping Conference Arrangements and Practices* 98 (1965). That test would confer jurisdiction on the facts in this case.

Similarly, the courts in England are required to apply a variant of the intent and material effects doctrine to foreign commerce, as a result of the United Kingdom's membership in the European Community.[28] Article 85(1)

Practices, Ger. L.I-36a; Austria: Cartel Act, § 4 ("This Federal Act shall also apply to cartels *concluded abroad but affecting the domestic market.*"; emphasis added), *reprinted in id.* at A.L.I-4.

[28] Professor Andreas Lowenfeld, who is listed as "of counsel" on the Merrett Brief, has noted that English courts applying even English *national* law (as opposed to European Community law) have exercised jurisdiction in fraud, blackmail, and products liability cases where the actions took place outside England but the harm was felt inside that country. *See* Fox, *Extraterritoriality*, at 583 n.100 (citing contribution from Professor Lowenfeld). As the District of Columbia Circuit observed in *Laker*, there is no principled distinction between the effects caused by these acts and the "no less tangible . . . harmful effects" caused by antitrust violations. 731 F.2d at 922-23. While the United Kingdom is not required to have logically consistent laws, its own activities suggest that international law does not prohibit taking jurisdiction over "foreign" conduct with domestic effects.

of the Treaty of Rome, JA-294, containing the relevant Community antitrust law, takes precedence over any contrary domestic law of the member states. *Wilhelm v. Bundeskartellamt*, Case 14/68, 1969 E.C.R. 1.[29]

European Community law applies to "enterprises not engaged in business in the Community, on the basis of the effect of restrictive practices within the Community." *Restatement (Third) of the Foreign Relations Law of the United States* § 415 n.9 (1987). In *Imperial Chemical Industries, Ltd. v. Commission*, Case 48/69, 1972 E.C.R. 619 ("*Dyestuffs*"), for example, the European Court of Justice took Article 85(1) subject matter jurisdiction over a foreign parent corporation by treating it and its Community subsidiary as one person, located within the Community. In *A. Åhlström Osakeyhtiö v. Commission*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, 1988 E.C.R. 5193 ("*Wood Pulp*"), the court held that it had Article 85(1) subject matter jurisdiction over foreign companies, even without subsidiaries in the Community, who sell into the Community, on the theory that such sales place the companies within the Community.[30] This test does not differ substantially from the *Alcoa* intent and material effects

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[29] *See also* European Communities Act, 1972, § 2(1), JA-295 (Community treaties "shall be recognised . . . and be enforced" in Britain); *Garden Cottage Foods v. Milk Mktg. Bd.*, [1983] 2 All E.R. 770 (H.L.) (where applicable, Community law is the law of England).

[30] Advocate General Darmon's opinion in *Wood Pulp* proposed that the Court adopt "the direct, substantial and foreseeable effect" test. 1988 E.C.R. at 5227. "Unless overruled by the Court, the Advocate General's opinion is persuasive authority in national courts." V. Korah, *Competition Law of Britain and the Common Market* § 9.2 (3d rev. ed. 1982). Regardless of what one official of the European Commission may have said in a university lecture, *see* U.K. Br. 21, the Court's opinion in *Wood Pulp* nowhere "overrules" the Advocate General, and his opinion remains "persuasive authority."

test. It would cover the conduct of the Reinsurers, who collectively refused to sell into the United States.[31]

B. This Case Presents No Conflict with Foreign Law.

The Reinsurer Petitioners claim that exercising antitrust jurisdiction here "would result in significant conflict with the law and policy of the United Kingdom." Merrett Br. 22. The United Kingdom would presumably be in the best position to identify that conflict. Yet nowhere in its *amicus* brief does the United Kingdom show that American antitrust law conflicts *in any way* with English substantive law.

The simple fact that the United States and the United Kingdom might legislate in an area does not create a conflict. *See, e.g.*, R. Weintraub, *Commentary on the Conflict of Laws* § 6.2 (1980) (court should identify and eliminate spurious conflicts). When the United States and a foreign country both prohibit the same type of conduct, there is no conflict. Similarly, when the United States prohibits certain conduct, while a foreign country permits it, this Court's antitrust precedents preclude defining that situation as a conflict. *See* pp. 35-36, *infra*. All of the conduct at

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[31] Petitioner Sturge relies heavily on *Wood Pulp* in its effort to obtain a separate dismissal. Sturge claims that, in that case, the European Court dismissed a claim against an American export association, KEA, because "while KEA was allegedly a forum for and participant in a cartel directed at Europe, KEA did not *implement* its agreement in the Community." Sturge Br. 21 (emphasis in original). The European Court, however, dismissed the claims against the association solely because the association "played [no] separate role" apart from those of its members, and so added nothing to the case. 1988 E.C.R. at 5245. Thus, Sturge is not the entity analogous to KEA in the instant case. That entity is Lloyd's of London, which the States have not sued.

issue in this case falls into one or both of these two categories.

By contrast, this Court's precedents indicate that a conflict could exist in two circumstances. When the United States prohibits conduct, but a foreign country compels a private party to undertake it ("foreign sovereign compulsion"), a conflict may arise. Also, when the United States prohibits conduct, but a foreign sovereign itself undertakes it ("act of state"), there may be a conflict. In both these circumstances, this Court *may*, although it *need not always*, refrain from taking jurisdiction. Neither of these situations is even arguably presented here.[32]

Kirkpatrick allows this Court to decline jurisdiction only when "a *'principle of decision* binding on federal and state courts alike' " permits it to do so. 493 U.S. at 406 (emphasis in original; citations omitted). The foreign sovereign compulsion and act of state doctrines are such principles. There is no room in this Court's jurisprudence for the creation of the additional "vague doctrine of abstention," *id.*, that the Reinsurer Petitioners urge on this Court.

1. There Is No Conflict Here Because American and English Law Both Prohibit the Conduct at Issue.

There can be no conflict if the laws of both states prohibit the conduct at issue. The applicable American law, of course, is antitrust law. "[W]hile our attachment to the antitrust laws may be stronger than most, many other countries . . . have similar bodies of competition law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 n.18 (1985). An examination of the two

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[32] "That neither of these doctrines even arguably would apply here is further evidence that no significant British interest or other governmental interest would be violated" by asserting jurisdiction. *Laker*, 731 F.2d at 942.

relevant English antitrust laws shows their congruence with American law.

There is no question that English law, both European Community and English national law, would have prohibited the conduct at issue if the targets of Petitioners' actions had been British primary insurers and their customers, rather than Americans. The "*Fire Insurance*" case, *Verband der Sachversicherer e.V. v. Commission*, Case 45/85, 1987 E.C.R. 405, presents facts strikingly similar to those alleged in the instant case. As here, primary insurers conspired, in that case to fix premiums to be charged in Germany. As here, the reinsurers agreed, in a separate but related conspiracy, not to reinsure coverage that did not conform to what the primary insurer conspirators desired, or to do so only at inflated prices. As the States request this Court to do, the European Court treated the reinsurers as part of the scheme that involved the primary insurers. *Id.* at 455. That court found that insurance was subject to Article 85(1),[33] and that the insurers had violated that Article by preventing, restricting, or distorting competition within the Community. *Id.* at 458-59.

In the same scenario, English national law would also prohibit the Reinsurers' conduct. The United Kingdom admits that "[t]he conduct of insurance business is subject to investigation under U.K. competition laws, [including] . . . the Competition Act, 1980." U.K. Br. 11-12.

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[33] That article prohibits "concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." JA-294. Trade between Member States can be affected even if, as here, all the agreeing parties live in one country and the agreement targets victims only in that country. *See Fire Insurance*, 1987 E.C.R. at 458-59 (primary insurer conspirators were German, as were their targets). *See also* United Kingdom, Department of Trade, *Review of Restrictive Trade Practices Policy* ("*Green Paper*") Annex F, ¶ 11, at 38 (1988).

That Act covers conduct exempted from the Restrictive Trade Practices Act, 1976 ("RTPA"), on which the Reinsurer Petitioners rely. Merrett Br. 25.[34] The Competition Act prohibits conduct that could distort competition connected to the provision of goods or services in the United Kingdom.[35] By limiting the competitive choices available to British reinsurance purchasers, the Reinsurers' conduct would have had the effect of distorting competition within the United Kingdom.

In these examples, the predominant competitive effects occurred in the United Kingdom. In the actual case, those competitive effects occurred overwhelmingly in the United States. That difference cannot be said to create a conflict, however. Using the existence of powerful American effects to deny American jurisdiction would stand this Court's case law on its head.[36]

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[34] The Competition Act, 1980, contains only two exemptions, including one for agreements registered under the RTPA. Competition Act § 2(2), JA-291-92. Agreements not registered under the RTPA, because for example of an exemption, are thus not exempt from the Competition Act.

[35] Section 2(1) of the Competition Act, 1980, provides: "[F]or the purposes of this Act, a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it." JA-291.

[36] In any event, Petitioners' conduct directed at Americans, as alleged in the complaints, does violate English law. *See, e.g., Coöperatieve vereniging "Suiker Unie" UA v. Commission*, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, 1975 E.C.R. 1663, 2016-20 (conspiracy to restrict exports outside the Community would have sufficient effects within the Community to constitute a violation of Art. 85 (1)).

Perhaps aware that it can show no actual conflict with British law, the United Kingdom takes a remarkable position: "A conflict arises in this case because Respondents ask the U.S. courts to impose substantial liability and restrictions on the British industry which is operating under the British regulatory and competition regime." U.K. Br. 9. The British government would preclude the United States from asserting *any* jurisdiction over a partially regulated British industry, even if, as here, the content of American law did not conflict at all with the content of British law. The Reinsurer Petitioners would also have this Court adopt this extreme rule, which harks back to the days of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). Merrett Br. 26-27. The Court then wrote that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." That conclusion, of course, has now been "substantially overruled." *Kirkpatrick*, 493 U.S. at 407.

The court of appeals erred when it accepted the British government's assertion of a conflict as conclusive. A-29 ("The British Brief reiterates [the district court's] conclusion [that this case 'would lead to a significant conflict with English law and policy']; we do not doubt its accuracy."). As the United States argued below, principles of international comity do not compel such deference. Brief of the United States as *Amicus Curiae* to the Ninth Circuit, at 28.[37]

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[37] In *First National City Bank v. Banco Para El Commercio Exterior de Cuba*, 462 U.S. 611, 621-22 (1983), a Foreign Sovereign Immunities Act case, this Court rejected the contention that it had to accept Cuba's *statutory* assertion as to the status of a Cuban corporation. Similarly, it need not accept Britain's assertion *in a brief* that a conflict exists, where Britain has so thoroughly failed to demonstrate a conflict, and where accepting that assertion would allow British reinsurers to violate the rights of Americans with impunity.

2. There Is No Conflict Here Even If English Law Permits the Conduct at Issue.

The United Kingdom indicates that it regulates the "solvency" and "financial stability" of English insurers. U.K. Br. 10-11. Nowhere does it suggest that it permits individual syndicates within Lloyd's to collude to prevent any of those syndicates from offering reinsurance or retrocessional insurance coverage. The United Kingdom certainly does not suggest that such conduct is permitted as part of a scheme to restrict insurance coverage in the United States.

Even if the United Kingdom did permit such conduct, this Court's precedents would not treat that as a conflict. In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), Mexico "aided" defendants' anticompetitive cartels by enacting "discriminatory legislation." The Court rejected defendants' reliance on this legislation, and found defendants subject to Sherman Act prosecution. *Id.* at 276. In *Continental Ore*, a Canadian company had been appointed the exclusive buying agent of vanadium for the Canadian government. The Canadian company defendant bought this vanadium from its co-defendants, as part of an illegal scheme. The Court rejected the Canadian company's contention that it should be exempted from the Sherman Act because it "was acting in a manner *permitted* by Canadian law." 370 U.S. at 706-07 (emphasis added).

Reinsurer Petitioners and their British *amici* suggest that the United States would be outraged if the roles here were reversed. Merrett Br. 28; Sturge Br. 26; U.K. Br. 14. The roles were reversed in *Wood Pulp*. There, an American Webb-Pomerene association[38] claimed that American

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[38] The Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1988), exempts certain activities of properly registered trade associations from the provisions of the Sherman Act.

law, which allowed its activities, conflicted with European Community law, which prohibited them. The European Court rejected that argument, just as this Court did in *Sisal* and *Continental Ore*: "*There is not . . . any contradiction* between the conduct required by the United States and that required by the Community *since the Webb-Pomerene Act* merely exempts the conclusion of export cartels from the application of United States antitrust laws but *does not require such cartels to be concluded.*" 1988 E.C.R. at 5244 (emphasis added). Contrary to Reinsurer Petitioners' speculations, "the United States authorities raised no objections regarding any conflict of jurisdiction when consulted by the [European] Commission." *Id. See also* United States, Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, Part I, § 5 (1988) (adopting the same approach as the cases cited); 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 239 (1978).

3. There Is No Conflict Here Because English Law Did Not Compel Reinsurers' Conduct.

Reinsurer Petitioners do not contend that any of their actions were compelled by the British government, and *the United Kingdom amicus specifically disclaims reliance on a compulsion theory*. U.K. Br. 24. Although this Court has never expressly ruled on this issue, a private action that was compelled by a foreign sovereign might avoid at least some antitrust scrutiny. *See Continental Ore*, 370 U.S. at 706-07. Even in such cases, however, this Court has not entirely deferred to foreign compulsion. In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), a Swiss law (a so-called "blocking statute") prevented the plaintiff from complying with an American court order to produce documents. The Court did not order dismissal of the plaintiff's action, but it did allow the trial court to draw negative inferences against the plaintiff for its failure to comply. *Id.* at 212-13.

Reinsurer Petitioners and the United Kingdom claim that the instant case conflicts with another "blocking statute," the Protection of Trading Interests Act, 1980 ("PTIA"), JA-281-90. Merrett Br. 26; U.K. Br. 3-4. As Justice Stevens has written for the Court, "American courts are not required to adhere blindly to the directives of such a statute." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n.29 (1987). Moreover, there is no conflict. The PTIA prohibits British courts from helping successful American plaintiffs recover multiple damages from British concerns. PTIA § 5(2)(a), JA-286. The States will not need any such assistance, because Petitioners have sufficient assets in this country to satisfy any judgments that might be awarded. The PTIA also allows British concerns to levy against American assets in the United Kingdom to offset any multiple damages they have paid. *Id.* § 6, JA-287-89. The PTIA does not prohibit British courts from assisting American courts in enforcing antitrust injunctions. The States do not expect to need even that aid, however, because their requests for injunctive relief can be handled entirely by American courts. *See* pp. 40-41, *infra*.

4. There Is No Conflict Here Because the Conduct Was Not That of a Foreign Sovereign.

A true conflict would most likely arise if American law prohibited certain conduct, but a foreign sovereign undertook it anyway. This Court's act of state doctrine avoids that conflict by rendering certain foreign sovereign actions immune from judicial scrutiny. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918).

Even in this area of clearest conflict, however, the Court has unanimously refused to expand the act of state doctrine to cover even conduct just outside the boundaries of that doctrine. *Kirkpatrick*, 493 U.S. at 401 (while the act of state doctrine applies to claims that "rest upon the asserted invalidity of an official act of a foreign sovereign," it will not be extended to claims that "require

imputing to foreign officials an unlawful motivation . . . in the performance of such an official act"). The facts of the instant case, involving as they do purely private acts, look much less like an act of state case than did the facts in *Kirkpatrick*. If this Court took jurisdiction over a case as close to the act of state doctrine as *Kirkpatrick, a fortiori* it should assert jurisdiction in the instant case.[39]

Further, even in act of state cases, a plurality of this Court has refrained from abstaining "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (opinion of Rehnquist, J.). A similar representation by the Executive Branch was made to the court below, *see* Brief of the United States as *Amicus Curiae* to the Ninth Circuit, at 25-30, and should certainly preclude this Court from applying a new "vague doctrine of abstention." *Kirkpatrick*, 493 U.S. at 406.

IV. IF THIS COURT DOES DECIDE TO ENGAGE IN A BALANCING TEST, THE REMAINING *TIMBERLANE* FACTORS FAVOR JURISDICTION.

In *Timberlane I*, the Ninth Circuit adopted what it described as a "jurisdictional rule of reason," 549 F.2d at 613, balancing seven factors to determine whether a court

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[39] Indeed, not even all actions by foreign sovereigns may be immune from American jurisdiction. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 706 (1976) (opinion of White, J., for four justices on an equally divided Court) (act of state doctrine does not apply to the "purely commercial operations" of foreign sovereigns).

should assert jurisdiction in cases involving foreign elements.[40] Even if the Court chooses to engage in a *Timberlane*-style multi-factor balancing test, it should affirm the holding of the court of appeals that the *Timberlane* factors overwhelmingly support the assertion of jurisdiction here. A-27-31. Four factors have already been discussed: intent to affect American commerce, foreseeability of such effect, relative importance of effects in the United States and elsewhere, and lack of conflict with English law. All strongly favor the assertion of jurisdiction. The remaining three factors, nationality and location of parties, location of conduct, and enforceability, also favor assertion of jurisdiction.

The plaintiff States are, of course, located in the United States and represent 130 million Americans. As *both* courts below correctly noted, " 'many of the corporate defendants,' including those located in England, 'are subsidiaries of American corporations and may be

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[40] To satisfy *Timberlane*, plaintiffs must pass through three hurdles. First, they must show "*some* effect – actual or intended – on American foreign commerce." 549 F.2d at 613 (emphasis in original). Second, they must show "a civil *violation* of the antitrust laws." *Id.* (emphasis in original). Finally they must survive a seven-factor balancing test. "The elements to be weighed include [1] the degree of conflict with foreign law or policy, [2] the nationality or allegiance of the parties and the locations or principal places of business of corporations, [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Id.* at 614.

influenced by the allegiance of their American parents.' " Court of appeals, A-29 (quoting district court, A-75).[41] This Court has treated a parent and subsidiary as one entity for antitrust purposes, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), as, for similar reasons, has the European Court of Justice, *see Dyestuffs*, 1972 E.C.R. at 661-63. There is no reason not to continue to do so in this context.

At least some of the relevant conduct took place in the United States. The States proffered evidence that the London defendants took part in important private meetings and public appearances in the United States. Proffered Facts ¶ V(E), JA-255. Counsel for defendants in the district court conceded that they made various "speeches and pronouncements" in this country. Transcript of Sept. 15, 1989, district court hearing, Docket Entry 866. Beyond this, it is impossible on the current record to determine where all the relevant conduct occurred, because no discovery on the merits has yet been allowed. District Court Pre-Trial Order No. 2, JA-105. This fact counsels against dismissal, as the *Timberlane I* court itself noted: "[D]ismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." 549 F.2d at 603. *See also Pillar Corp. v. Enercon Industries Corp.*, 694 F. Supp. 1353, 1361 (E.D. Wis. 1988).

The court below held that an American court's order of injunctive relief could be enforced and a judgment of money damages collected without the assistance of an English court. A-30. An American court can enforce all

[41] The London Company Market defendants in the applicable counts have foreign parentage. Proffered Facts ¶ V(A)(1), JA-254. They include such well-known "English" names as *Kemper* Reinsurance London, Ltd., and *CNA* Re (U.K.), Ltd. Although Reinsurer Petitioners state that they "have no American parents, subsidiaries or affiliates," Merrett Br. 6 n.7, the London Company Market defendants have joined in their brief, *id.* at 3 n.4, and are properly considered here.

requested injunctive relief against American parents of foreign subsidiaries and American primary insurance defendants.[42] Petitioners' fears that American courts will control the British insurance industry are, thus, unfounded. Finally, as the court of appeals noted, the States can collect any damages entirely "from assets of the foreign defendants within the United States." A-30.[43]

[42] Although Reinsurer Petitioners quarrel with certain features of injunctive relief that the States once requested, Merrett Br. 25-26, the States have since informed both courts below that they do not expect to need any injunctive relief beyond that indicated in the accompanying text. Appellant's Opening Brief to the Ninth Circuit, at 54-55.

[43] The complaints satisfy the requirements of other balancing tests as well. For example, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979), would include the possible effect on foreign relations as a factor. When, as in the court below, the Executive supports the assertion of jurisdiction, a court should defer to its assessment of the effects on foreign relations.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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